U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 30 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Rachel DiIorio for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on March 18, 2013, the AAO dismissed the appeal. The matter is again before the AAO on a motion to reconsider. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is an engineering and planning firm. It seeks to permanently employ the beneficiary in the United States as a structural engineer under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the marriage fraud bar under section 204(c) applies to the case and denied the petition accordingly. On appeal, the AAO affirmed the director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage entered into for the purpose of evading the immigration laws, and dismissed the appeal.

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

On motion, counsel contends that the AAO was in error in concluding that the beneficiary's marriage was not bona fide because the written record does not contain substantial and probative evidence of marriage fraud. Counsel asserts that the AAO should have remanded the Form I-140, Immigrant Petition for Alien Worker (Form I-140) to U.S. Citizenship and Immigration Services (USCIS) after determining the director erroneously applied 8 C.F.R. § 245.1(c)(8)(v) in the marriage fraud determination. Counsel states that the AAO applied the correct standard in the marriage fraud determination, but failed to give the beneficiary an opportunity to supplement the record. Counsel further states that the AAO did not weigh the favorable evidence in the record against the petitioning spouse's letters withdrawing the two Form I-130, Petition for Alien Relative (Form I-130) petitions. Counsel asserts that the petitioning spouse's statements in the withdrawal letters – that the beneficiary used her to stay in the United States legally, makes no sense because the beneficiary was in legal H-1B status at the time of the marriage. Further, counsel contends that these letters are not reliable, and cannot be verified as being from the petitioning spouse because they were mailed to the Service, and are not signed or sworn to before a USCIS officer. Counsel argues that sole basis of the fraud determination made by the director and the AAO was the written record, and that an interview with the beneficiary and the petitioning spouse should have been conducted.

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. *See* 8 C.F.R. § 103.5(a)(3). A motion to reopen must state new facts. *See* 8 C.F.R. § 103.5(a)(2).

Upon review, the AAO finds that the motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because counsel has not established that the AAO made an erroneous decision through misapplication of law or policy.

Section 204(c) states the following:

Notwithstanding the provisions of subsection (b)[1] no petition shall be approved if

(1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws or
(2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

Counsel errs in asserting that the director and AAO wrongly concluded that there is not substantial and probative evidence of marriage fraud in the record. The director and AAO based their determination of marriage fraud on a series of letters from the petitioning spouse. In the first withdrawal letter dated July 7, 2003 the petitioning spouse stated that the beneficiary used her to stay in the United States legally and that they did not live together from June 2001 to April 2002. In the second letter dated July 24, 2007, the petitioning spouse explained that she was petitioning for the beneficiary again and that the previous letter was a result of "some a misunderstanding during our adjustment period." In the next withdrawal letter dated July 29, 2008, the petitioning spouse stated that beneficiary married her so that he could stay in the United States legally and that they did not live together. The director and AAO were correct in finding that these letters from the petitioning spouse regarding the validity of the marriage are substantial and probative evidence that the marriage is not bona fide. In addition, the AAO also described significant contradictory statements from the beneficiary, the petitioning spouse, the petitioning spouse's friend, and the beneficiary's aunt regarding the dates that the beneficiary and the petitioning spouse allegedly lived together, as well as the inconsistent statements made by the beneficiary regarding his prior marriage. In making its determination, the AAO had reviewed the evidence in the record – including airline reservations, a statement by an attorney about the couple, a credit card statement, cell phone records, and bank statements, and determined that it did not establish that during their seven-year marriage the beneficiary and petitioner visited regularly, kept in touch, or had a significant co-mingling of finances.

Counsel also contends that the petitioning spouse's statement in the withdrawal letters – that the beneficiary used her to stay in the United States legally, makes no sense because the beneficiary was in legal H-1B status at the time of the marriage. Regardless of whether or not the beneficiary held nonimmigrant H-1B status at the time of his marriage, the record reflects that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage, which would have enabled him to immigrant to the United States and live here permanently.

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[1] Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

Counsel asserts that the withdrawal letters are not reliable, and cannot be verified as from the petitioning spouse because they were mailed to USCIS, and are not signed or sworn to before a USCIS officer. The letters contained in the record dated July 7, 2003, July 9, 2003, and July 24, 2007 are signed by the petitioning spouse. In addition, counsel provides no credible evidence that would establish that these letters are not from the petitioning spouse.

Counsel asserts that the AAO should have remanded the Form I-140 petition to USCIS after determining the director erroneously applied 8 C.F.R. § 245.1(c)(8)(v) in the marriage fraud determination, but has not established how the beneficiary was prejudiced by the AAO's adjudication of the Form I-140 petition.[2]

Counsel also contends that the AAO failed to give the beneficiary an opportunity to supplement the record. On appeal, the petitioner had an opportunity to provide additional relevant evidence and make new arguments on behalf of the beneficiary. In addition, the petitioner had an opportunity on motion to clarify matters raised by the AAO and submit new evidence on behalf of the beneficiary.

Counsel argues that the fraud determination made by the director and the AAO was based solely on the written record, and should have included an interview with the beneficiary and the petitioning spouse. The petitioner had an opportunity to present affidavits on behalf of the beneficiary on appeal and it is unclear what additional evidence might have been presented through an interview beyond the information contained in an affidavit. In the instant motion counsel does not state the additional evidence that could have been presented through an interview beyond information in the letters, unsworn statements, and affidavits contained in the record.

In summary, counsel has not established that the AAO's decision dated March 18, 2013 was erroneous and based on an incorrect application of law or Service policy.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)).

The motion to reconsider will be dismissed for the reasons stated above. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The motion to reconsider is dismissed and the decision of the AAO dated March 18, 2013 is affirmed. The petition is denied.

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[2] The director relied on 8 C.F.R. § 245.1(c)(8)(v) and stated that the beneficiary must show by clear and convincing evidence that he married the petitioning spouse in good faith.